

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Implementation of
the Affordable Connectivity Program

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) WC Docket No. 21-450
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COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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NCTA – The Internet & Television Association (“NCTA”)¹ hereby submits these comments in response to the Wireline Competition Bureau’s Public Notice² on the implementation of the Affordable Connectivity Program (“ACP” or the “Program”) enacted as part of the Infrastructure Investment and Jobs Act (“Infrastructure Act”).³ As the Public Notice explains, ACP retains the core components of the Emergency Broadband Program (“EBB” or “EBB Program”) while “modif[y]ing] and extend[ing]” EBB.⁴ Consistent with Congress’s objective that the Commission “provide an orderly transition” from EBB to ACP, and the goal of getting and keeping consumers connected to broadband, NCTA encourages the Commission to prioritize ensuring continuity and minimizing consumer disruption during this transition, while also encouraging continued robust provider participation in ACP.

¹ NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation’s cable television customers, as well as more than 200 cable program networks. Cable service providers have invested more than \$290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation’s largest Wi-Fi networks.

² *Wireline Competition Bureau Seeks Comments on the Implementation of the Affordable Connectivity Program*, Public Notice, WC Docket No. 21-450, DA 21-1453 (rel. Nov. 18, 2021) (“Public Notice”).

³ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. F, tit. V, § 60502(a)(3)(10)(C)(ii)(V), 135 Stat. 429, 1241 (2021) (“Infrastructure Act”).

⁴ Public Notice ¶¶ 1, 2.

I. INTRODUCTION AND SUMMARY

NCTA members have been at the forefront of ensuring that Americans remain connected to fast and reliable broadband internet access service, launching low-income broadband programs well before the COVID-19 pandemic and then expanding them to meet the new demands for connectivity resulting from the pandemic.⁵ These programs helped ensure that low-income consumers have been able to access the internet when they needed it the most. NCTA members have been active participants in the EBB Program and strongly support the transition to the longer-term ACP.

In this initial critical phase of the transition from EBB to ACP, the Commission should prioritize ensuring continuity and minimizing consumer disruption, consistent with the goal of providing an “orderly” transition.⁶ Other issues, including the adoption of new consumer protection rules, can and should be deferred until after the transition is behind us, particularly given the operational complexities involved for the Commission, USAC, and providers for the transition process alone. To best achieve the Program’s goals, NCTA proposes the following framework:

Ensure seamless continuity from EBB Program to ACP

- To minimize disruption for consumers, existing EBB households should not be required to opt-in to ACP in order to continue participating in the Program. NCTA members’ experience with opt-in requirements in similar situations—especially ones that follow long after the initial point of purchase—suggests that the vast majority of current EBB households will not respond to opt-in notices, risking potentially massive termination of benefits if opt-in consent is required. Instead, USAC and providers should provide existing EBB households sufficient advance notification of the new Program, including the reduction in monthly benefit from \$50 to \$30 following the 60-day transition period, and providers will

⁵ A full listing of member company efforts is available on NCTA’s website at Responding to COVID-19, <https://www.ncta.com/response> (last visited Dec. 5, 2021).

⁶ Infrastructure Act § 60502(a)(3)(B), § 904(b)(10)(C)(ii)(V).

work with households to make any requested changes to their services prior to the reduction in the benefit;

- As the Public Notice proposes and the EBB Transition Order confirms,⁷ all EBB-enrolled households should continue receiving the EBB benefit during the entire 60-day transition period;
- Work with providers to ensure an adequate transition period; and
- Continue to include enrollment in a Community Eligibility Provision (“CEP”) school as a qualifying benefit program.

To avoid consumer confusion and ensure administrability of the Program, clarify the scope of the service offerings eligible for the ACP benefit

- Clarify that “any internet service offering” means offerings that are generally available to new customers, including plans limited to low-income customers (subject to the same terms as those plans for new customers), but does not require providers to offer grandfathered plans;
- Confirm that “associated equipment” remains eligible for reimbursement;
- Clarify that, as under EBB, minimum service standards do not apply; and
- Establish that the ACP benefit covers taxes and other governmental fees.

Afford providers reasonable flexibility in meeting Program obligations

- Confirm that credit checks are only prohibited when they are required for the ACP-eligible customer to apply the benefit to an internet service. For example, ordinary course credit checks are permissible for customers who have not yet applied for the ACP benefit, or for ACP customers who are seeking to purchase non-supported services such as video or equipment or devices not otherwise covered by ACP;
- Clarify that the 90-day period for termination based on non-payment starts from the date of the first unpaid or partially unpaid bill;
- To further minimize disruption for consumers, and consistent with current permissible practice under the EBB Program, a provider should be permitted to proactively move a non-paying household to a plan that is fully covered by the affordable connectivity benefit;

⁷ Infrastructure Act § 60502(b)(2); *In re Emergency Broadband Benefit Program & Affordable Connectivity Program*, Order, WC Docket Nos. 20-445, 21-450, DA 21-1477 ¶¶ 7, 11 (WCB rel. Nov. 26, 2021) (“EBB Transition Order”).

- Allow for provider flexibility in providing notice about and advertising the Program;
- Utilize the Commission’s existing dedicated consumer complaint process, as the Public Notices proposes; and
- Providers should be permitted to obtain affirmative consent from new households at the time of enrollment in the Program to continue providing service after the end of the Program, and EBB households that have already provided opt-in consent to continue receiving service should not be required to do so again.

Adapt EBB Rules for ACP to reflect ACP’s longer-term status and to encourage provider participation

- Allow service providers up to one year to submit claims for reimbursement;
- Clarify that the ACP benefit should be applied no later than the beginning of the subscriber’s first full billing period;
- Require USAC to confirm household eligibility for households enrolled via the National Verifier not more than once annually;
- Clarify that recertification of households enrolled via alternative verification processes (“AVP”) will occur annually on a rolling basis either via the AVP or by USAC, at the provider’s option, provided that no reverification will occur before July 1, 2022;
- Confirm that USAC should be responsible for sending notices and re-verifying households in instances where the household may no longer be eligible for the ACP benefit (*e.g.*, those who qualified for the EBB Program in the National Verifier via the substantial loss of income criteria);
- Clarify that an activated modem constitutes “usage” for plans without a monthly fee;
- Consistent with the statute, do not require providers that are already participating in the EBB Program to submit election notices that identify the services for which the ACP benefit will be available or the rates for those services;
- Confirm the continuation of the previously approved AVPs under ACP with no new approvals required;
- Permit providers to continue offering or providing commission compensation to enrollment representatives based on the number of consumers who apply for or are enrolled in ACP; and

- Confirm that a customer who de-enrolls without transferring to another benefit provider may still receive the credit for the service received and the provider may still report that customer on that month's snapshot to receive the reimbursement.

Defer consideration of other crucial issues until after the transition period, as permitted by Congress, including

- Adoption of the additional consumer protection rules required by the Infrastructure Act; and
- Permit continuation of EBB consent and consumer protection practices during the transition period and allow for a reasonable period after the rules are released to develop and implement necessary system changes.

Adoption of these proposals will help promote a successful transition from EBB to ACP and will ensure that millions of households already receiving the benefit will continue to do so.

II. THE COMMISSION SHOULD ADOPT RULES THAT ENSURE SEAMLESS CONTINUITY FROM THE EBB PROGRAM TO ACP TO BEST ACHIEVE CONGRESS'S OBJECTIVE TO PROVIDE AN ORDERLY TRANSITION AND ENSURE LOW-INCOME CONSUMERS REMAIN CONNECTED.

Consistent with Congress's objective of "provid[ing] an orderly transition for participating providers and consumers from the Emergency Broadband Benefit Program . . . to the Affordable Connectivity Program,"⁸ the Commission should prioritize minimizing consumer and provider disruption during and after the abbreviated transition from the EBB Program to ACP. First, because ACP is a continuation of EBB,⁹ existing EBB households should not be forced to opt in again, particularly considering they just did so weeks or, at most, months earlier. An opt-in requirement is likely to lead to a loss of support or potentially even loss of service for many EBB households because, based on NCTA members' experience, the vast majority will likely not respond to an opt-in notice. As discussed below, there are other measures available to

⁸ Infrastructure Act § 60502(a)(3)(B), § 904(b)(10)(C)(ii)(V).

⁹ See Public Notice ¶ 6 ("On November 15, 2021, the Infrastructure Act became law, modifying and extending the EBB Program and renaming it the Affordable Connectivity Program." (footnote omitted)).

limit any rate shock as a result of the reduction in monthly benefit from \$50 to \$30 for non-Tribal households.

Second, the Commission should allow all EBB-enrolled consumers—including existing EBB subscribers who may not qualify for ACP—to receive the EBB benefit during the entire transition period. Third, the Commission should take into account the numerous operational issues this transition will create for providers—such as new notification requirements, outreach, and billing system changes required within a compressed timeframe—and work with providers to ensure a minimally disruptive transition period. Additionally, to further ensure providers can provide the benefit to all eligible households, the Commission should confirm, as it did in EBB, that household eligibility for ACP can be based on student enrollment in the Community Eligibility Provision.

A. The Commission Should Not Require Existing EBB Households to Opt-In to ACP.

In the Public Notice, the Commission proposes requiring all households that seek to participate in ACP—including EBB-enrolled households—to opt-in to participation in ACP.¹⁰ Because ACP is a continuation of EBB, no second opt-in consent is necessary or appropriate. As the Commission found “[h]ouseholds that are enrolled in the EBB Program as of December 31, 2021, will automatically participate in the 60-day transition period and are not required to separately opt-in or affirmatively request enrollment solely for the purposes of continuing to receive their benefit during the 60-day transition period.”¹¹ Applying this logic, no opt-in post-transition period should be required because ACP, like the 60-day transition period, is a continuation of the broadband benefit. An opt-in requirement will disserve Congress’s goals of a

¹⁰ See Public Notice ¶ 123.

¹¹ EBB Transition Order ¶ 11.

smooth transition¹² that retains ACP eligibility for the vast majority of EBB households, and risks leaving many EBB households without any benefit. NCTA therefore urges the Commission to determine that notice of the transition from EBB to ACP and an opportunity to opt-out of the Program—rather than an opt-in requirement—is sufficient to continue to offer ACP to EBB-enrolled households.

NCTA also has serious concerns about the efficacy of an opt-in requirement because of its members' experiences with extremely low rates of affirmative opt-in responses in other similar contexts.¹³ For example, one member's sponsored service program for K-12 students received only a *de minimis* percentage of opt-ins, even though a response was required to retain broadband service. Another provider found that substantially less than half of its customers opt-in to receive the free equipment necessary for faster speeds after a network upgrade.¹⁴ Because existing EBB households just opted into the EBB Program weeks or, at most, months ago, another opt-in requirement could create unnecessary confusion for customers who do not understand that they need to opt-in again.¹⁵

Any existing EBB households that fail to opt in again will lose the \$30 ACP benefit, even if they are eligible to receive it. If, like many of NCTA providers' EBB households, the customer has already provided opt-in consent to continue to receive service at the end of the Program, their bill will automatically increase to the standard rate for the service they are

¹² Infrastructure Act § 60502(a)(3)(B), § 904(b)(10)(C)(ii)(V).

¹³ Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA – The Internet & Television Ass'n, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 21-450, 20-445 (Nov. 23, 2021).

¹⁴ *Id.*

¹⁵ See EBB Transition Order ¶ 7 (stating that “[r]equiring providers to issue notices to households about the end of the EBB Program in the manner prescribed by the rules could cause alarm about a perceived loss of service, and confusion”).

receiving under EBB. Households that have not consented to continue to receive service may be disconnected after the end of the EBB transition period and thus lose their broadband altogether. Either of these results would directly undermine the goal of an orderly transition and continuation of an affordable service offering, contravene the goals of ACP, and would likely have a broader impact on the Program and its reputation as consumers’ negative experiences with the Program become widely known.

Rather than an opt-in requirement, NCTA encourages the Commission to consider instead implementing a robust opt-out requirement—providing consumers with advance notice of the change and giving them sufficient opportunity to change or cancel their service plan based on the anticipated change in the benefit amount prior to the end of the transition period. Because EBB is a continuation of ACP, notifications about general program-wide changes for the transition to ACP (*e.g.*, the reduction in the monthly benefit level) should be sent to all EBB households by USAC. As the EBB Transition Order recognizes,¹⁶ USAC is well-positioned to provide this notice to consumers because the National Lifeline Accountability Database (“NLAD”) contains the information for each enrolled household.¹⁷ Providers will send separate notifications from USAC that may contain more targeted, company-specific information to their EBB households, including explaining how providers will work with households to make requested changes to their services prior to the change in the benefit amount. This, combined with the prohibition on early termination fees and the 90-day deferral of termination for non-

¹⁶ EBB Transition Order ¶ 13.

¹⁷ USAC is uniquely situated for identifying and notifying households that qualified for the EBB Program under the “substantial loss of income” criteria. *See* p 30, *infra*.

payment, will ensure that participating households have the tools to address any concerns with the change in the benefit amount.¹⁸

If the Commission does require opt-in, however, the Commission will need to consider and ensure providers have sufficient time to prepare and send the opt-in notices, to receive responses from subscribers, and to make other appropriate adjustments to the Program.

B. To Minimize Disruption During the Transition, All EBB Households Should Continue to Receive the EBB Benefit During the Transition to ACP.

Congress provided that a “household that qualified for the Emergency Broadband Benefit Program . . . shall, during the 60-day period beginning on that effective date, be eligible for that benefit in the amount in effect with respect to that household, as of the day before that effective date.”¹⁹ Acknowledging this requirement, the Commission stated that “[d]uring the transition period, households currently enrolled in the EBB Program will continue to receive the same benefit level they are receiving as of the effective date.”²⁰ NCTA supports the guidance in the EBB Transition Order making clear that all households that received the EBB benefit will continue to receive that same credit amount over the transition period following the December

¹⁸ See, e.g., Infrastructure Act § 60502(b)(1)(B), § 904(b)(6)(A)(i) (requiring certification that households will not be charged early termination fees); § 60502(a)(3)(B)(ii), § 904(b)(7)(B) (requiring 90-days of non-payment prior to termination of service).

¹⁹ Infrastructure Act § 60502(b)(2).

²⁰ Public Notice ¶ 4.

31, 2021 EBB end date.²¹ NCTA similarly supports the EBB Transition Order’s decision to waive the end of EBB Program notices, recognizing that ACP is a continuation of EBB.²²

The transition period will allow providers and consumers alike to identify the changes needed to adjust to the new \$30 benefit. While consumers also need the time to plan for the changes to the credit amount if their plan is over \$30, this period—and the maintenance of benefits during this period—is also critical for providers, who will require sufficient time to incorporate the modifications ACP makes to the EBB Program into their billing systems.

C. Participating Providers Will Need Flexibility and Reasonable Timeframes to Ensure a Seamless Transition Period.

As described above,²³ the transition period will require significant work by providers to adjust their systems, as well as numerous other modifications that will be needed to wind-down the EBB Program and to begin ACP. Additionally, because the EBB Transition Order “anticipate[s]” that final rules will be adopted in January, after the wind-down of the EBB Program and the start of ACP,²⁴ the Commission will need to provide flexibility and reasonable timeframes for required actions outside of the statutory transition period. For example, the

²¹ See EBB Transition Order ¶¶ 7, 11 (“[T]hese households will continue to receive a benefit of up to \$50 a month during the 60-day transition period rather than an immediate reduction to the \$30 a month benefit set for the Affordable Connectivity Program. EBB Program households that qualified for the monthly benefit of up to \$75 a month will continue to receive that benefit amount during the 60-day transition period.”); see also Public Notice ¶ 124. Some providers must de-enroll and re-enroll an EBB customer in NLAD to update a customer’s address. If an EBB customer moves during the transition period, but does not change service providers, that customer would appear in NLAD to have enrolled in ACP during the transition period. As EBB customers, however, they should continue to receive their EBB benefits during the transition period. NCTA urges the Commission to give providers this relief so they can provide these customers with their EBB benefits during the transition period and receive full reimbursement.

²² EBB Transition Order ¶ 7; Public Notice ¶ 124 n.234 (discussing the final notices required under the EBB Program). Notices of the end of the EBB Program would have only caused confusion about subsidy continuation.

²³ See *supra* p. 9.

²⁴ See EBB Transition Order ¶ 8 n.25.

Public Notice seeks comment on a number of questions that may require notices or other communications to consumers and rightly acknowledges that providers’ “train[ing of] their customer service representatives and prepar[ing] their systems” for such requirements will take time.²⁵ In order to distribute these notices, providers will need sufficient clarity from the Commission about the timing and content of these notices.

Providers will need flexibility because billing system modifications require development work that is not possible in a compressed timeframe—a situation that is exacerbated by the need to both wind-down EBB and start up ACP at the same time. Providers are unable to begin transitioning their systems—from customer service representative roles to billing system programming—without additional information from the Commission on providers’ obligations. Providers also need to adjust advertising, outreach, notifications, and multiple enrollment processes (*e.g.*, digital flows, phone agent flows, and in-person interactions in stores). To ensure that providers choose to participate in ACP, the Commission should work to support providers in this transition.

Given that the effective date of the Program—December 31, 2021—occurs before the anticipated release of final rules in January, providers will also need guidance from the Commission as soon as possible regarding enrollments in ACP that occur prior to the date the Program rules go into effect. In light of the complexities involved in the compressed transition period described above, providers should be permitted to follow the EBB rules (to the greatest extent possible) when enrolling ACP customers during this interim period after the launch of the Program but before rules are in place.

²⁵ *See, e.g.*, Public Notice ¶ 106.

D. The Commission Should Continue to Include Schools Participating in the Community Eligibility Provision as a Qualifying Benefit Program.

Households where at least one member of the household has been approved to participate in the National School Lunch Program (“NSLP”) are eligible for ACP benefits.²⁶ However, many schools do not participate in NSLP—which requires applications from each family to determine eligibility—but instead participate in CEP. CEP allows high-poverty schools to offer meals at no charge to all students, without the students providing proof of eligibility or the school itself having to determine and certify the actual percentage of students that would qualify.²⁷

As the Commission found in the EBB Order, schools participating in CEP are “among the highest-poverty schools in the nation [and] including households with students that attend those schools [in the EBB eligibility criteria] efficiently targets low-income households and excluding such schools would counterintuitively effectively remove the National School Lunch Program as a qualifying program for households in largely low-income schools and school districts.”²⁸ Because of this, and because of the poverty levels experienced by such schools, “[m]any commenters support that households with children enrolled in . . . schools or school districts that participate in the Community Eligibility Provision should be eligible for the emergency broadband benefit under Section 904(a)(6)(B) despite not individually applying for

²⁶ Consolidated Appropriations Act, 2021, div. N, tit. IX, § 904(a)(6)(A)-(E), Pub. L. No. 116-260, 134 Stat. 1182, 2133-34 (2020) (“CAA”), *amended in part and stricken in part by* Infrastructure Act § 60502(b)(1)(A)(i)(I), (II), (III), (IV), (V), (VI).

²⁷ See Food Research & Action Center, *Facts: Community Eligibility Provision* (May 2020), <https://frac.org/wp-content/uploads/frac-facts-community-eligibility-provision-1.pdf>.

²⁸ *In re Emergency Broadband Benefit Program*, Report and Order, 36 FCC Rcd 4612, 4629 ¶ 56 (2021) (“EBB Order”).

assistance.”²⁹ To ensure ACP reaches the households that have the most need, the Commission should continue to include enrollment in schools participating in the CEP as a qualifying benefit program.³⁰

III. TO AVOID CONSUMER CONFUSION AND ENSURE ADMINISTRABILITY OF THE PROGRAM, THE COMMISSION SHOULD CLARIFY THE SCOPE OF THE SERVICE OFFERINGS ELIGIBLE FOR THE ACP BENEFIT.

The Public Notice seeks comment on “ways in which the Commission could facilitate the[] program changes so as to minimize any potentially disruptive impacts on low-income consumers.”³¹ To that end, the Commission should clarify the scope of the internet service offerings that are eligible for the benefit, including by giving providers flexibility regarding legacy plans, affirming that associated equipment is eligible for reimbursement under the Program, clarifying that minimum service standards do not apply, and extending the benefit to cover taxes and other governmental fees.

²⁹ EBB Order, 36 FCC Rcd at 4638-39 ¶ 55 & n.165 (citing comments from the cities of Los Angeles, CA, Chicago, IL, Portland, OR, Boston, MA, and the Texas Coalition of Cities for Utility Issues; Tech Goes Home; Digital C; Center for Democracy & Technology; WISPA; Free Press, Access Now; New America’s Open Technology Institute; Benton Institute for Broadband & Society; CETF; Aurora Institute; NAHMA; AASC; and the Council of the Great City Schools).

³⁰ EBB Order, 36 FCC Rcd at 4639 ¶ 56. The Commission’s recent Advisory raising concerns about potential waste, fraud, and abuse with respect to EBB Program enrollments based on the CEP does not warrant a different result. FCC Memorandum, *Advisory Regarding Fraudulent EBB Enrollments Based on USDA National School Lunch Program Community Eligibility Provision* (FCC OIG Nov. 22, 2021), <https://docs.fcc.gov/public/attachments/DOC-378076A1.pdf>. Indeed, the Commission has already announced additional measures for verification of eligibility that will improve the reliability of CEP-based enrollments. *Wireline Competition Bureau Announces Additional Program Integrity Measures for Emergency Benefit Program Enrollments Based on the Community Eligibility Provision*, Public Notice, WC Docket No. 20-445, DA 21-1464 (rel. Nov. 22, 2021); *Office of Managing Director Announces Mitigation Measures for Emergency Broadband Benefit Program Enrollments Based on the Community Eligibility Provision*, Public Notice, WC Docket No. 20-445, DA 21-1465 (rel. Nov. 22, 2021).

³¹ Public Notice ¶ 3.

A. The Commission Should Clarify that “Any Internet Service Offering” Does Not Require the Inclusion of Any Offering that Is Not Generally Available to New Customers, Including a Provider’s Grandfathered Plans.

The Infrastructure Act provides that a participating provider “shall allow an eligible household to apply the affordable connectivity benefit to any internet service offering of the participating provider at the same terms available to households that are not eligible households.”³² The Public Notice seeks comment on the interpretation of “any internet service offering” and whether it should include “legacy or grandfathered plans or whether it only includes current offerings of a provider to new customers.”³³ To ensure the administrability of the Program, the Commission should, consistent with the statute, permit a provider to limit the internet service offerings eligible for ACP reimbursement to those generally-available, current offerings of the provider.

The CAA and EBB Order limited the internet service offerings eligible for the EBB benefit to those that were available as of December 1, 2020.³⁴ The rationale behind this limitation was to “prevent[] participating providers from increasing prices above the usual market rate for their services for the purpose of claiming the maximum reimbursement amount.”³⁵ The Infrastructure Act revises this provision, allowing a provider to apply the ACP benefit to “any internet service offering of the participating provider at the same terms available to households that are not eligible households.”³⁶

³² Infrastructure Act § 60502(a)(3)(B)(ii), § 904(b)(7)(A)(i).

³³ Public Notice ¶ 53.

³⁴ See CAA § 904(a)(9); EBB Order, 36 FCC Rcd ¶ 72.

³⁵ EBB Order, 36 FCC Rcd at 4647 ¶ 72.

³⁶ Infrastructure Act § 60502(a)(3)(B)(ii), § 904(b)(7)(A)(i).

Internet service “offerings” typically only include the plans currently available to new customers at any given time; legacy plans that are no longer offered to new customers do not fall in this category, even if some existing customers may be receiving service under those plans. Consistent with the statutory language, current provider offerings should be available under the ACP, while legacy plans should be available only if the provider chooses to make them available.

This change is beneficial because it facilitates more flexibility and expanded options for low-income consumers. In implementing this provision, the Commission should confirm that the requirement applies only to service offerings that are generally available in the marketplace, not legacy plans. The Commission, however, should not prohibit providers from choosing to allow consumers to apply their ACP benefit to legacy plans.

Importantly, to ensure eligible households have as many options as possible, the Commission should also confirm that a provider’s current low-income offerings are eligible for the ACP benefit. Indeed, Congress retained the CAA provisions that a provider’s pre-existing low-income plan as of April 1, 2020, remains eligible,³⁷ confirming that the new Infrastructure Act provision requiring “the same terms” as are offered to non-ACP households is not intended to exclude low-income offerings. Such a conclusion is consistent with the goals of this Program.

Confirming that providers must extend the benefit to those plans currently offered by providers and not to legacy plans will help with the administration of the Program. In particular, it may be difficult to adjust billing systems for service offerings that are no longer actively marketed. If the Commission nonetheless interprets this statutory language to include legacy plans, only eligible households currently enrolled in such plans should qualify for the benefit.

³⁷ EBB Order, 36 FCC Rcd at 4617 ¶ 11.

Even then, providers who do not offer existing EBB households the option to apply their benefit to legacy plans will need time to implement this requirement and apply the discount to all legacy plans.

B. The Commission Should Confirm that Associated Equipment Remains Eligible for Reimbursement.

The Public Notice seeks comment on whether monthly rental costs for equipment such as modems and routers should be eligible for the ACP benefit.³⁸ The Commission should conclude that the ACP benefit should continue to cover costs for such associated equipment that is necessary to receive broadband service, including equipment that is not separately itemized.³⁹ The CAA expressly provides that the EBB benefit can be applied not only to internet service offerings but also to associated equipment, and the EBB Order accordingly incorporated the costs of associated equipment into the EBB Program.⁴⁰ Consistent with the CAA, the Commission determined that “associated equipment includes equipment necessary for the transmission functions of Internet service offerings supported through the EBB Program which households may choose to receive.”⁴¹

In revising the statutory definition of the affordable connectivity benefit, the Infrastructure Act omits the reference to “associated equipment” as an incidental change to other now superseded definitions.⁴² Congress’s omission of this reference, however, should not be

³⁸ Public Notice ¶ 59.

³⁹ *Id.*

⁴⁰ CAA § 904(a)(7); EBB Order, 36 FCC Rcd at 4650-51 ¶ 78.

⁴¹ EBB Order, 36 FCC Rcd at 4650 ¶ 78.

⁴² Compare Infrastructure Act § 60502(b)(1)(A)(ii), § 904(a)(7)(A) (defining “affordable connectivity benefit” as “a monthly discount for an eligible household applied to the actual amount charged to such household, in an amount equal to such amount charged”) with CAA § 904(a)(7) (defining “emergency broadband benefit” as “a monthly discount for an eligible household applied to the actual amount charged to such household, which shall be no more than the standard rate for an internet service offering and

interpreted to preclude the applicability of the benefit to associated equipment. The reference to associated equipment in the prior definition of “emergency broadband benefit” was part of a clause that referenced the EBB “standard rate” benchmark; its deletion was simply incidental to the Infrastructure Act’s deletion of all “standard rate” references. Nothing in the statute precludes recovery of fees for equipment that is necessary to utilize the broadband service. The Commission should continue to allow the ACP benefit to be applied to associated equipment necessary for broadband service to work, as under the EBB Program.

Additionally, equipment that is not separately itemized (*i.e.*, is included in the service at no additional cost) should be considered an element of the service and deemed eligible for support. Some providers offer low-income plans that include equipment costs in the base price of service. A requirement to allocate out equipment costs at standalone equipment rates could have the perverse effect of requiring a low-income consumer to pay *more* for the equipment than they would for the unsubsidized price of the service plan.

C. It Is Not Necessary to Adopt Minimum Service Standards for Service Offerings Eligible for ACP.

The Public Notice seeks comment on whether it should apply minimum service standards for service offerings that are eligible for reimbursement as part of the Program.⁴³ The Commission properly declined to apply minimum service standards as part of the EBB Program, and there is no reason to change this approach for ACP. Moreover, as discussed above, providers must make the ACP benefit available to eligible households for “any internet service

associated equipment”). Nor does new subsection (a)(7) preclude extending the benefit to associated equipment. While that provision refers to “internet service offerings,” Infrastructure Act § 60502(b)(1)(A)(ii), the Commission can conclude, as it did under the EBB Program, that certain equipment is part and parcel of such offerings because it is necessary for a customer to utilize the broadband service.

⁴³ Public Notice ¶ 54.

offering of the participating provider at the same terms available to households that are not eligible households.”⁴⁴ Applying minimum service standards to ACP offerings would be in tension with this statutory mandate. Furthermore, ACP minimum service standards are not necessary because NCTA members already generally offer a multitude of robust internet service options in the marketplace today, and these options will be available as part of ACP for eligible households. As Chairwoman Rosenworcel recognized, given that there are over 1,200 providers participating in EBB “competing against each other to try to provide the best services, the highest speeds at the lowest cost to consumers,”⁴⁵ providers have strong incentives to ensure that their service offerings are attractive to ACP customers.

D. The Commission Should Establish that the ACP Benefit Covers Taxes and Other Governmental Fees.

Under the EBB Program, the benefit cannot be used to pay for taxes and other governmental fees.⁴⁶ The Infrastructure Act removes this limitation, however.⁴⁷ Because the definition of the “Affordable Connectivity Benefit” is no longer tied to the “standard rate,” the Commission has discretion to apply the benefit to taxes and other governmental fees because they are part of the “actual amount charged” to households. Failure to do so could result in providers having to bill fully subsidized ACP participants for minimal amounts—the taxes associated with equipment rentals, for example—or pay those taxes themselves.

⁴⁴ Public Notice ¶ 53.

⁴⁵ Internet Innovation Alliance, *Deleting the Broadband Affordability Divide: A Virtual Chat with FCC Acting Chair Rosenworcel*, at 27:35-27:44 (Sept. 13, 2021), https://www.youtube.com/watch?v=7Q81IN_RNkc&t=1625s.

⁴⁶ 47 C.F.R. § 54.1600(s) (defining “standard rate” to exclude taxes or other governmental fees) and CAA § 904(a)(13) (same); *see also* EBB Order, 36 FCC Rcd at 4646 ¶ 70.

⁴⁷ Infrastructure Act § 60502(b)(1)(A)(iv).

IV. THE COMMISSION SHOULD AFFORD PROVIDERS REASONABLE FLEXIBILITY IN MEETING PROGRAM OBLIGATIONS.

ACP includes several new requirements and consumer safeguards intended to inform consumers of the new Program and avoid sudden disconnections as a result of non-payment. NCTA urges the Commission to afford providers reasonable flexibility in implementing these new provisions. Such flexibility will enable providers to promptly and efficiently administer the Program and thereby ensure that consumers can promptly and fully utilize the affordable connectivity benefit.

Specifically, the Commission should promote provider participation by confirming that providers may continue to rely throughout the transition period on the internal processes that have been established to manage the EBB Program, including those processes that ensure that customers' bills will be paid, allow credit checks that do not impact any customer's ability to participate in ACP in certain reasonable circumstances, clarify that the 90-day period for termination based on non-payment begins on the date of the first unpaid or partially paid bill, and allow providers to proactively move ACP households that do not pay their bills to a plan that is fully covered by the affordable connectivity benefit. Further, the Commission should provide for flexibility in the notice and advertising of the Program, should utilize the existing complaint processes for ACP, and should allow providers to obtain affirmative consent from households at the time of enrollment in the Program to continue providing service upon de-enrollment or at the end of the Program.

A. The Commission Should Confirm that Credit Checks that Also Apply to Non-ACP Customers Are Permissible, and Clarify When the 90-Day Period for Termination Begins.

To ensure continued provider participation in the Program, the Commission should establish rules that support a provider's ability to ensure timely payment for its services. First,

the Commission should confirm that providers may continue to conduct credit checks in reasonable circumstances, consistent with their usual business practices, so long as the credit check does not impair any customer’s ability to participate in ACP. The Infrastructure Act provides that a participating provider “may not require the eligible household to submit to a credit check *in order to apply the affordable connectivity benefit to an internet service offering* of the participating provider.”⁴⁸ The thrust of this prohibition is that credit checks should have no bearing on whether an eligible ACP customer can use the benefit for an internet service offering. It does not mean that credit checks—especially those voluntarily generated by a consumer—should be prohibited in *all cases*, or that providers should be forced to completely change all of their purchase processes to ensure a potential ACP beneficiary does not somehow end up having a credit check run.

The Public Notice seeks comment on this provision and proposes to prohibit providers from inquiring, requesting, or otherwise causing a consumer to submit to a credit check, or from accessing a consumer’s credit information, before enrolling the consumer in ACP but seeks comment regarding whether credit checks may be permissible.⁴⁹ This proposed restriction is much too broad; as discussed below, there are numerous circumstances where a provider may reasonably inquire about, request, or otherwise cause a credit check to occur, or where the customer never even tells the provider that they are interested in applying or have applied for the ACP. Congress prohibited credit checks as a part of the process of an ACP customer applying the benefit to an internet service but did not otherwise limit a provider’s routine credit-check processes, including for non-ACP customers and/or services not covered by ACP. So long as

⁴⁸ Infrastructure Act § 60502(a)(3)(B)(ii), § 904(b)(7)(A)(ii) (emphasis added).

⁴⁹ Public Notice ¶¶ 81-82.

providers make it clear to potential customers that a credit check is not needed to participate in ACP, but may be necessary, for example, to obtain upgraded equipment, the statutory requirement is met. Consistent with the plain meaning of the statute, credit checks should be prohibited only to the extent they are a precondition to the provider determining whether to apply the benefit to a covered internet service for an ACP-eligible customer.

Hewing to the statutory language will avoid disrupting service providers' ordinary business practices, which is especially important now as it allows providers to focus on implementing the other changes required by the transition. For example, a provider does not necessarily know at the time a potential customer is considering various broadband service offerings whether that customer is eligible for ACP or, even if eligible, whether that customer intends to apply the ACP benefit to the provider's services. Thus, a customer who does not want to wait for confirmation of ACP eligibility to initiate service may choose to enter their credit or debit card information or provide other information (*e.g.*, the last four digits of a social security number) that will generate at least a "soft" credit check.⁵⁰

Providers should also be permitted to continue utilizing ordinary course credit checks that apply to all prospective or existing customers—including those eligible for or participating in ACP—who express an interest in purchasing services, such as video, or equipment and devices that are outside the scope of ACP. Here, too, if the provider makes clear to the customer that the result of any credit check will not affect that customer's ability to apply the ACP benefit to a broadband tier, running a credit check for a non-covered service or equipment, including one bundled in with a broadband service, should not run afoul of the credit-check prohibition. A

⁵⁰ In this case, providers would be prohibited from denying a request to initiate service for an ACP eligible consumer based on the results of the standard credit check.

broader prohibition could deprive ACP customers of the ability to purchase other services and products that they may want. At a minimum, the Commission should make clear that providers are in compliance with the credit-check provision as long as the provider discloses to prospective customers that the customer need not submit to a credit check in order to apply an ACP benefit to broadband service, and provides the customer with the ability to avoid generating a credit check in connection with the customer's request to apply the ACP benefit to their chosen broadband service offering.⁵¹

Second, the Commission should clarify that the 90-day period for termination based on non-payment in the statute starts from the date of the first bill sent to the customer, not the bill due date. The Infrastructure Act provides that a participating provider may terminate a customer's service after 90 days of non-payment.⁵² Consistent with current practices and billing systems, the 90-day period should start on the date of the first ACP bill that is unpaid or partially unpaid. This ensures that participating providers can track consumer status in the most efficient and accurate manner. Specifically, this rule would avoid imposing new burdens on billing systems and would be easier for the subscriber to track than if the 90-day period starts to run on a date not linked to the subscriber's billing cycle.

To further the Program's goal of ensuring connectivity, providers should have flexibility to move a household to a service plan in which the ACP benefit would fully cover the cost of

⁵¹ The Public Notice also asks whether any requirement to certify compliance with the credit-check provision should "apply to all households enrolled in the [ACP], or only to new households enrolling in the [ACP]," and whether "providers [must] make this certification for existing customers." Public Notice ¶ 81. In no event should ACP providers that participated in EBB be required to certify compliance with a requirement that did not exist at the time customers were enrolled (during the EBB Program and leading up to the start of ACP); the requirement should only apply to new households enrolling in ACP *after* the Commission clarifies the scope of the prohibition.

⁵² Infrastructure Act § 60502(a)(3)(B)(ii), § 904(b)(7)(B).

service if the household fails to make a monthly payment for service after the transition to ACP, as was permitted under the EBB Program.⁵³ Affording this flexibility would ensure that both those customers who are not currently receiving a bill for broadband because the monthly service cost is equal to or less than the benefit amount *and* those customers whose bills increase more than they can afford continue to receive completely covered broadband rather than face disconnection for non-payment. Such flexibility also protects customers from unnecessarily creating debt for additional months of nonpayment prior to potential termination of service. This will improve the transition for consumers and providers alike, and will give consumers additional time to determine both their broadband and budgetary needs while maintaining access to broadband service.

B. The Commission Should Avoid Overly Prescriptive Rules Regarding Advertising of the Program.

The Public Notice seeks comment regarding notifying consumers about the existence of ACP.⁵⁴ Just as the Commission did under the EBB Program, which granted “providers the flexibility to develop their own marketing plans,”⁵⁵ the Commission should provide flexibility in how providers notify consumers about the existence of ACP when the customer subscribes to or renews an internet service offering, including, but not limited to, allowing providers to send email notifications or SMS messages, put notices on the website or in bills, or post signage in

⁵³ USAC EBB Program—Frequently Asked Questions, <https://www.usac.org/about/emergency-broadband-benefit-program/webinars-and-trainings/ebb-program-frequently-asked-questions> (last visited Dec. 5, 2021) (explaining that a provider can move a customer into a lower-priced plan “if the subscriber falls behind on their portion of the bill for the EBB-supported service”). Consistent with this guidance, providers have incorporated this possibility into their customer disclosures and FAQs.

⁵⁴ Public Notice ¶ 106

⁵⁵ EBB Order, 36 FCC Rcd at 4675 ¶ 135.

stores. Likewise, the Commission should provide flexibility on the timing for providing such notice.

The Infrastructure Act does not mandate any particular form of notice; it merely provides that providers shall notify customers about the existence of ACP and how to enroll.⁵⁶ In the EBB Order, the Commission found that, “providers are in the best position to understand how to market a new program to the communities they serve.”⁵⁷ The Commission should allow the same flexibility in the advertising of ACP, as it did in EBB,⁵⁸ rather than imposing a prescriptive advertising requirement as proposed in the Public Notice.⁵⁹ Imposing separate advertising requirements and notification requirements just for ACP would add even more complexity for providers participating in the new Program, particularly those who are transitioning from the EBB Program, and could delay or deter participation. Moreover, permitting providers with flexibility in marketing ACP will enable them to draw on their proven experience in promoting the EBB Program, which has more than 8 million households enrolled, and extend that experience to ACP.

C. The Commission Should Utilize the Existing Complaint Processes for ACP.

The Infrastructure Act requires that the Commission develop a “dedicated complaint process” for ACP participants.⁶⁰ The Public Notice proposes fulfilling this requirement by adding ACP “content to the Consumer Complaint Center to educate consumers about the

⁵⁶ Infrastructure Act § 60502(a)(3)(B), § 904(b)(10)(A).

⁵⁷ EBB Order, 36 FCC Rcd at 4675 ¶ 135.

⁵⁸ See EBB Order, 36 FCC Rcd at 4675 ¶ 135 (“declin[ing] to mandate that providers engage in more prescriptive forms of EBB Program promotion” and instead “grant[ing] providers the flexibility to develop their own marketing plans”).

⁵⁹ Public Notice ¶ 115.

⁶⁰ Infrastructure Act § 60502(a)(3)(B)(ii), § 904(b)(9)(A).

Program, a dedicated pathway in the Consumer Complaint Center to file ACP-related complaints, including notification to the providers that the complaint involves the Affordable Connectivity Program, clear direction to consumers on how to correctly file an ACP complaint, and dedicated Commission staff from the Commission’s Consumer and Governmental Affairs Bureau (“CGB”) to review and process the complaints.”⁶¹

NCTA supports this approach. The existing informal complaint processes work well and building in a dedicated ACP complaint pathway complies with the Infrastructure Act. Having one area of the Commission website through which consumers can file complaints will make the process easier for consumers, the Commission, and providers. In addition, by applying applicable processes and deadlines for the existing informal complaint process to ACP complaints, the Commission avoids the burdensome task of applying a separate set of rules to ACP complaints. Finally, as with the advertising requirements, the Commission should provide flexibility in how providers notify ACP households of the existence of a complaint process.

D. If Consumers Have Provided Consent, They Should Continue to Receive Services Post-Benefit.

Many providers obtained opt-in consent from EBB households, at the time they enrolled in the EBB Program, to continue receiving service at the provider’s standard rates, terms, and conditions after the EBB Program ends and the benefit is eliminated. Given the continuity between EBB and ACP, if an EBB household has already agreed to continue receiving service, such agreement should continue to govern even after the customer de-enrolls or is de-enrolled from ACP or at expiration of the Program. A requirement to obtain this consent again is unnecessary and is likely to create confusion among customers who previously provided their

⁶¹ Public Notice ¶ 87.

consent to continue receiving services, creating a significant risk that these households would lose all service when the Program ends. Confirmation by the Commission that households and providers can continue to rely on this prior consent will also avoid situations where customers are disconnected from services they thought they opted into.⁶²

The Commission should also continue to permit providers to obtain affirmative consent from new subscribers that did not participate in EBB, at the time of their initial enrollment in ACP, to continue providing service after the end of the Program. A provider should not, however, be required to obtain opt-in to continue service once the Program ends for their existing customers.⁶³ Because existing subscribers receive service from their provider at an undiscounted rate, it is implicit that these customers would want to continue their service at the end of the Program even though they will no longer receive the benefit. Moreover, if an existing customer inadvertently does not check this opt-in box when they sign up for ACP, then they will lose their service immediately after the Program ends, which is inconsistent with the goals of keeping people connected through this Program.

V. THE COMMISSION SHOULD ADJUST CERTAIN EBB RULES GIVEN THE LONGER-TERM NATURE OF ACP AND TO ENCOURAGE ONGOING PROVIDER PARTICIPATION.

Because the EBB Program was intended to be a temporary, emergency program, certain of the rules the Commission adopted in the EBB Order are not compatible with the ACP's longer-term duration and should be modified for ACP. These changes will encourage broad provider participation.

⁶² Subscribers who no longer wish to subscribe to their existing plan upon termination of the benefit would have the option of changing plans or discontinuing service.

⁶³ See Public Notice ¶ 104.

A. The Commission Should Revise Certain EBB Program Rules in Recognition that ACP Is a Longer-Term Program.

Consistent with the longer-term nature of the Program, the Commission should ensure that providers have more flexibility in submitting reimbursement claims, clarify that the initial ACP benefit should be applied no later than the beginning of the subscriber's first full billing period, limit the household recertification requirement to no more than once-per-year, determine that USAC should be responsible for sending notices in instances where the household may no longer be eligible for the benefit, and find that an activated modem constitutes usage of a covered broadband service offering.

First, the Commission should establish that providers have longer than 15 days to submit their claims for reimbursement, similar to other longer-term programs. The Public Notice seeks comment "on the length of time providers should have for uploading and certifying their claims for a service month."⁶⁴ The EBB Program requires providers to submit their claims for reimbursement 15 days after the snapshot report of a provider's enrolled subscribers that is sent on the first of the month.⁶⁵ However, in light of the fact that ACP "will extend longer than the EBB Program" and it can be particularly difficult for providers to submit their claims for reimbursement within that limited window, NCTA agrees with the Commission's approach that it should "offer providers more flexibility regarding the deadlines by when they must certify their claims."⁶⁶ The Commission should adopt the same requirement as under Lifeline, that "[s]ervice

⁶⁴ Public Notice ¶ 77.

⁶⁵ EBB Order, 36 FCC Rcd at 4661 ¶ 98.

⁶⁶ Public Notice ¶ 77. While certain adjustments to the EBB reimbursement process are appropriate and beneficial for ACP, the Commission should leverage the existing EBB USAC claims system (*i.e.*, Lifeline Claims System) to the greatest extent possible for ACP to help ensure a smooth transition from EBB to ACP.

providers have up to one year after the data month to submit original claims and upward revisions.”⁶⁷

Second, the Commission asks whether it should require providers to immediately apply the discount upon enrollment in ACP.⁶⁸ NCTA encourages the Commission, in recognition of the issues that providers faced during the implementation of the EBB Program, to determine that the initial ACP benefit should be applied no later than the beginning of the subscriber’s first full billing period, rather than immediately. This would prevent a customer from receiving multiple subsidies in one billing period. Additionally, it would ensure that providers are reimbursed for credits provided to eligible customers.

To the extent the Commission does not permit providers to coordinate the application of benefits to customer billing cycles, the Commission must recognize that this could result in a customer receiving two ACP credits in a single calendar month based on the date of the customer’s billing cycle—and a provider not being eligible for reimbursement for the second credit as a result of USAC reimbursing only one credit per month.⁶⁹ This was the case for some providers who proactively issued EBB credits to eligible customers immediately upon their enrollment in the EBB Program. In such cases, providers should be entitled to a full EBB/ACP reimbursement equal to the aggregate credit amount issued to customers, either as part of a true-up reimbursement process or supplemental reimbursement claims process for this subset of

⁶⁷ USAC, *Lifeline Claims System*, <https://www.usac.org/lifeline/lifeline-claims-system-lcs> (last visited Dec. 5, 2021). If the Commission maintains the fifteenth day of the month claims submission deadline, it should permit providers to revise their claims up to one year after submission and waive the filing deadline for thirty days for January and February 2022. *See generally* Order, *In the Matter of Emergency Broadband Benefit Program*, WC Docket No. 20-445, DA 21-671 (rel. June 8, 2021) (waiving the 15-day deadline for the first month of the EBB Program).

⁶⁸ Public Notice ¶ 84.

⁶⁹ 47 C.F.R. § 54.1608(b); *see also id.* §§ 54.1603, 54.1600(s).

relevant customers. This true-up reimbursement process or supplemental claims process for such eligible households should also be available for those EBB providers who proactively issued EBB credits to eligible households immediately upon enrollment.

Third, the Public Notice proposes that, in contrast to the short-term EBB Program, households enrolled in ACP should be required to recertify their eligibility for ACP annually, starting with the calendar year following their enrollment in ACP.⁷⁰ To the extent the Commission adopts such requirements, NCTA agrees with the proposal in the Public Notice that USAC should be responsible for recertifying households whose eligibility in ACP is verified through the National Verifier and notifying providers promptly of any determination that a household is no longer eligible.⁷¹ The Public Notice seeks comment on whether USAC should also perform the recertifications for consumers initially deemed as eligible via approved AVP processes or whether ACP providers should perform these recertifications.⁷² NCTA supports giving providers the option of having USAC recertify such customers. For providers that instead choose to recertify these customers themselves, the Commission should clarify that providers' AVP eligibility criteria control such a recertification and that customers should be recertified annually on a rolling basis rather than on a single anniversary date. However, given that the transition will already be complicated and taxing on providers and their systems, the Commission should allow these rolling recertifications to be conducted beginning no earlier than July 1, 2022, to ensure that providers have adequate time to establish appropriate processes.

⁷⁰ Public Notice ¶ 49.

⁷¹ Public Notice ¶ 50.

⁷² Public Notice ¶ 51.

Relatedly, and consistent with the approach in the EBB Transition Order, USAC should be responsible for sending notices in instances where the household may no longer be eligible for the benefit—most specifically for households that qualified for the EBB Program under the “substantial loss of income” criteria.⁷³ There, because providers frequently relied on National Verifier to verify the eligibility of a household who qualified for the EBB Program based on loss of income, USAC is better positioned than providers to identify these households. NCTA thus supports the approach in the EBB Transition Order of “rely[ing] on USAC’s resources as much as possible to complete the reverifications” for these households and thus directing USAC to provide this notice to consumers and asking them to submit information for reverification to all consumers who qualified via “substantial loss of income,” whether verified by the National Verifier or AVP. USAC should also be responsible for the additional follow-up with service providers regarding customer status (*i.e.*, notice of reverification or notice of de-enrollment should a household not re-qualify), and notifications to the customers that they have been de-enrolled.

Finally, NCTA urges the Commission to clarify that an activated modem constitutes usage for fixed broadband services. The Public Notice proposes adopting a usage requirement, as per the EBB Program and Lifeline,⁷⁴ and seeks comment regarding whether the existing definition of usage is adequate and “include[s] sufficient methods by which subscribers receiving fixed broadband service could demonstrate usage.”⁷⁵ The non-usage rule is based on the Lifeline

⁷³ Providers could of course supplement the USAC notices with their own notices.

⁷⁴ The EBB Order also requires that participating providers confirm that households receiving fully subsidized service have used the service during the relevant period. EBB Order, 36 FCC Rcd at 4658-59 ¶ 92.

⁷⁵ Public Notice ¶ 45.

rules and is focused on mobile offerings, not fixed broadband.⁷⁶ Given the Commission’s goal of establishing “a broad, technologically neutral approach to provider participation in the EBB Program,”⁷⁷ the Commission should refine its definition of usage in the ACP context to account for different technologies and ensure that usage requirements are consistent with the relevant technology in this longer-term Program.

B. The Commission Should Modify Certain EBB Program Rules to Encourage Continued Broad Provider Participation.

One of the Commission’s goals in implementing EBB was to “encourage as many providers as possible to participate in the EBB Program.”⁷⁸ Maximizing broad provider participation should continue to be a goal for ACP, especially because it will exist for a longer period, and there are several steps that the Commission can take to meet this goal.

First, there is no reason for providers that are already participating in the EBB Program to continue submitting, and USAC to continue reviewing, election notices that identify the services for which the ACP benefit will be available or the rates for those services.⁷⁹ While NCTA supports a one-time “refresh” of election notices that simply indicate each provider’s intention to participate in or exit the Program, and indicate whether providers choose to offer fixed, mobile, or both services, the Commission need not mandate that participating providers submit and continuously update their specific service offerings that are available for reimbursement under

⁷⁶ See 47 C.F.R. § 54.407(c)(2). For example, “usage” can be established by a subscriber completing an outbound call, purchasing minutes or data to add to the subscriber’s service plan, answering an incoming call, or sending a text message.

⁷⁷ EBB Order, 36 FCC Rcd at 4617 ¶ 12.

⁷⁸ EBB Order, 36 FCC Rcd at 4616 ¶ 10; *see also* Comments of the National Hispanic Media Coalition at 3, WC Docket No. 20-445 (Jan. 25, 2021) (“It should logically flow that any regulation the Commission puts forth in the establishment of the Emergency Broadband program should also be governed by this original mandate from Congress to ensure adequate competition exists in the broadband marketplace.”).

⁷⁹ Public Notice ¶ 14.

ACP. Such a requirement would be not only extremely burdensome but also inconsistent with the ACP statute, which requires the benefit to be applicable to all service offerings that are generally available to non-ACP customers on the same terms.⁸⁰ Given that ACP no longer has a December 1, 2020 rate and terms benchmark, and no longer affords discretion to providers to choose to offer only a limited number of service offerings, it is unnecessary and would be unduly burdensome for providers to submit, and USAC to review, these election notices.

For example, if the EBB rules continued to apply, a provider that chooses to develop new plans or pricing during the ACP period (to attract more customers in a competitive marketplace), may not be able to offer the plan until it receives approval of its updated USAC notice.

Assuming roughly the same number of service provider participants in ACP as in EBB,⁸¹ imposing these requirements could introduce significant delay in implementing the Program and offering new service and pricing plans to ACP customers, contrary to the Commission's original goal of "provid[ing] help to those in need and [ensuring the benefit is] not wasted by providers unable to quickly deliver broadband services."⁸² Instead of requiring more than 1,200 providers to submit election notices with available service offerings and rates for USAC review and approval, providers should be required to certify when submitting reimbursement requests that the service subscribed to by the ACP household is available on the same terms available to households that are not eligible households.⁸³

⁸⁰ For the reasons explained above, the Commission should clarify that this requirement means all internet service offerings that are generally available to new customers.

⁸¹ There are 1,214 providers currently participating in the EBB Program. Emergency Broadband Benefit Providers, FCC, <https://www.fcc.gov/emergency-broadband-benefit-providers> (last updated Dec. 2, 2021).

⁸² EBB Order, 36 FCC Rcd at 4616 ¶ 10.

⁸³ As discussed above, low-income plans that are generally available to low-income consumers would also qualify under this certification.

Second, the Commission should confirm the continuation of the previously approved alternative verification processes, with the exception of those COVID-19 programs that were not included in the Act.⁸⁴ Although the Commission discussed alternative verification processes at length in the Public Notice, it also emphasized the use of the National Verifier, its accuracy, and its connections to state and federal databases.⁸⁵ While NCTA supports widespread use of the National Verifier, there are circumstances in which the National Verifier does not cover the range of persons eligible for a provider's existing low-income program, or presents other enrollment difficulties.⁸⁶ The importance of the alternative verification processes and providers' efforts to enroll their eligible low-income customers in ACP should continue to be acknowledged and supported by the Commission.

Third, the Commission asks whether it should prohibit providers from offering or providing to enrollment representatives or their direct supervisors any commission compensation that is based on the number of consumers who apply for or are enrolled in ACP.⁸⁷ When implementing the EBB Program rules, the Commission declined to apply any prohibition, noting that it sought to "avoid discouraging provider participation and diminishing consumer choice in the Program."⁸⁸ The same logic applies for ACP and the Commission should continue to permit the payment of this type of arrangement.

⁸⁴ See Public Notice ¶¶ 24-25.

⁸⁵ Public Notice ¶ 28 n.53.

⁸⁶ U.S. Gov't Accountability Off., GAO-15-335 *Telecommunications: FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program*, at 27-29 (2015), <https://www.gao.gov/assets/gao-15-335.pdf> (finding that the process of securing and providing documentation for program eligibility for submission to the National Verifier can be a deterrent to program participation for those who need help the most).

⁸⁷ Public Notice ¶ 20.

⁸⁸ EBB Order, 36 FCC Rcd at 4681 ¶ 147.

Finally, the Commission should confirm that a customer who de-enrolls without transferring to another benefit provider may still receive the credit for the service received and the provider may still report that customer on that month's snapshot to receive the reimbursement. The Public Notice proposes requiring "participating providers to transmit the de-enrollment information to the NLAD within one business day of de-enrollment,"⁸⁹ which is what was required by the EBB Order.⁹⁰ Under the EBB Program, however, the interaction between this rule and the snapshot requirements—*i.e.*, that providers are required to submit a reimbursement request based on the number of subscribers enrolled on the snapshot date—has created a situation wherein providers give the household a credit but are deprived of reimbursement if a provider gives the benefit to a customer who de-enrolls before the snapshot date. This is occurring frequently, and as a result, the loss associated with giving customers benefits for which the providers are not reimbursed does not come out in the wash.

VI. THE COMMISSION SHOULD DEFER CONSIDERATION OF CERTAIN ISSUES UNTIL AFTER THE TRANSITION PERIOD.

A. The Commission Should Clarify that the EBB Rules Apply During the Entire Transition Period.

The Commission has identified several other issues that deserve consideration and comment from all interested parties, including those related to consumer protection. Given the truncated comment cycle, the short deadline for Commission action, and the immediate goal of ensuring a smooth transition from EBB to ACP, however, NCTA recommends that the Commission defer adoption of any changes other than those necessary to operationalize the launch of ACP at \$30 and the 60-day transition period until at least three months after the

⁸⁹ Public Notice ¶ 44.

⁹⁰ EBB Order, 36 FCC Rcd at 4679-80 ¶ 144.

transition period ends. These are important issues but deserve additional time for consideration and the formulation of detailed comments. Attempting to address these issues now would also risk distracting the Commission, USAC, providers, and other stakeholders from the immediate need to complete the transition.

Finally, in order to both improve the provider transition and to discourage bad actors, the Commission should state that, to the extent consistent with the ACP statute, providers that follow the EBB Program rules throughout the entire transition period should be deemed to be in compliance with the Program. Providers may not receive notice of new rules until mid-January and will need time to make adjustments to internal procedures and billing systems.⁹¹

B. The Commission Should Defer Rules on Additional Consumer Protection Measures Until After the Transition to EBB Is Complete.

The Infrastructure Act requires that the Commission promulgate rules prohibiting any “inappropriate” upselling or downselling and other specified conduct.⁹² Congress’s directive requires the Commission and affected parties to develop a record on upselling and downselling and distinguishing “inappropriate” from “appropriate” practices in an administrable fashion. Upselling and downselling, for example, have a legitimate role in the ACP. Customer service representatives should be able to recommend plans that fit a customer’s needs. Likewise, given that customers are eligible to apply ACP to all tiers, a customer service representative should not be prohibited from providing consumers with information about faster tiers of internet service. Nor should a representative be prohibited from providing consumers information about promotions involving other products and services (such as voice and video) that they may be interested in and would prove beneficial.

⁹¹ EBB Transition Order ¶ 8 n.25.

⁹² Public Notice ¶ 93; Infrastructure Act § 60502(a)(3)(B)(ii), § 904(b)(11)(A)(i).

A customer service representative, in these and similar instances, should be encouraged to ask about the household's online usage and other entertainment or communications activities to help determine what plans or products may fit that household's needs. Further, signing customers up to term promotional service plans (typically with lower rates, and without any early termination fees for internet service consistent with the ACP statute) should not be deemed inappropriate opt-in requirements or inappropriate restrictions on switching internet service tiers or switching providers. All of these activities are common to a competitive marketplace in which participating providers will be vigorously competing for ACP customers just as they compete for non-ACP customers, consistent with the statute—and there is no reason that ACP customers should be artificially insulated from the benefits of such competition.

Fully developing these issues will require more than the 20 days allotted for comments and for replies in this proceeding. The EBB Transition Order states that the “Commission must promulgate rules for the implementation of the Affordable Connectivity Program within 60 days of enactment.”⁹³ The Public Notice similarly seeks comment on whether the rulemaking is also within the scope of the CAA's general exemption of program implementation rules from the Administrative Procedure Act (“APA”).⁹⁴ The Public Notice also acknowledges that Congress required this particular rulemaking separately from the program implementation rules and expressly made it subject to the APA.⁹⁵

⁹³ EBB Transition Order ¶ 8 n.25.

⁹⁴ Infrastructure Act § 60502(a)(3)(B), § 904(b)(11) (specifically requiring the Commission to promulgate consumer protection rules in accordance with the APA); *see also* CAA § 904(h) (providing exemption from APA requirements).

⁹⁵ Public Notice ¶ 91.

The Commission requests comment on these seemingly contradictory directives,⁹⁶ but any seeming contradiction is easily resolved. The 60-day requirement and the APA exemption apply to proceedings to promulgate regulations under Section 904(c).⁹⁷ Subsection (c), in turn, refers to regulations “to implement” the Program.⁹⁸ “[I]t is a commonplace of statutory construction that the specific governs the general.”⁹⁹ Congress specifically established a rulemaking to address certain “inappropriate” practices outside of the subsection (c), and specifically provided that they must be promulgated in accordance with the APA. The canon “has full application” “to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side.”¹⁰⁰ Excluding this rulemaking from the truncated deadline of subsection (c) and applying the APA to the proceeding to promulgate these rules “avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one. . . . The terms of the specific authorization must be complied with.”¹⁰¹

If the Commission nonetheless decides to go forward to adopt rules to limit “inappropriate” practices, “inappropriate” for these purposes should mean practices that are coercive or fraudulent, or practices that the provider has not clearly disclosed to consumers.¹⁰² Simple and clear rules will protect consumers while encouraging providers to participate in the Program without having to rework their entire customer service systems. NCTA reiterates,

⁹⁶ Public Notice ¶ 91.

⁹⁷ Public Notice ¶ 91; CAA §§ 904(c)(1), (h)(1).

⁹⁸ CAA § 904(c).

⁹⁹ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

¹⁰⁰ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

¹⁰¹ *Id.*

¹⁰² *See, e.g., Colo. Env’t Coal. v. Wenker*, 353 F.3d 1221, 1231 (10th Cir. 2004) (concluding that “[p]erhaps bribes or threats . . . could be regarded as inappropriate influence.”).

however, that the best course would be for the Commission to defer action on this rulemaking. Not only is this course required by the statute, it will give the Commission the benefit of considered input from consumers and providers, including those who did not participate in EBB, and other interested parties.

VII. CONCLUSION

NCTA members have consistently demonstrated their commitment to expanding broadband connectivity, through the development of robust offerings for low-income consumers and by their participation in EBB. Adopting the proposals outlined above will enable the Commission to build on the success of EBB, and ensure that all eligible households have access to, and stay connected to, fast and reliable broadband internet access service under ACP.

Respectfully submitted,

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